U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 June 2006

CASE NO.: 2004-BLA-06437

In the Matter of

KENNETH E. MORGAN
Claimant

v.

CALVERT & YOUNDBLOOD COAL CO.
Employer

and

CAPITAL FIRE & MARINE INSURANCE CORP.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-interest

Appearances:

PATRICK K. NAKAMURA, Esq.
For Claimant

JAMES M. KENNEDY, Esq.
For Employer

Before:

JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the federal Black Lung Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title. [1]

[1] The Department of Labor ("DOL") has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at C.F.R. Parts 718, 722, 725, and 726 (2002). They are applicable to all claims pending, on, or filed after that date. See 20

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as Black Lung, is a dust disease of the lungs resulting from coal dust inhalation.

On June 17, 2004, this case was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. Subsequently, the case was assigned to me. I held a hearing on October 26, 2005, in Birmingham, Alabama, at which time the parties had full opportunity to present evidence and argument.

I. ISSUES

(1) Whether Claimant has pneumoconiosis pursuant to 20 C.F.R. § 718.202;

(2) Whether Claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. § 718.203;

(3) Whether Claimant is totally disabled pursuant to 20 C.F.R. § 718.204;

(4) Whether Claimant's pneumoconiosis contributes to his total disability pursuant to 20 C.F.R. § 718.204; and

(5) Whether Employer is the responsible operator pursuant to 20 C.F.R. § 725.495.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Kenneth Eugene Morgan ("Claimant") filed a claim for federal black lung benefits with the U.S. Department of Labor, Office of Workers' Compensation Programs ("OWCP"), on August 19, 2002. DX-2. By Proposed Decision and Order dated February 25, 2004, the District Director, OWCP ("the Director"), awarded Claimant benefits under the Act. DX-42. In the Proposed Decision and Order, the Director credited Claimant with sixteen (16) years of coal mine employment and named Calvert & Youngblood Coal Co. ("Employer") as the responsible operator. Id. On March 8, 2004, Employer filed a request for a formal hearing before the Office of Administrative Law Judges ("OALJ") in order to contest the Director's findings. DX-43.

The matter was referred to OALJ on June 17, 2004. The claim was initially assigned to Administrative Law Judge ("ALJ") Linda S. Chapman. On October 18, 2004, Employer filed a Motion for Continuance, which was granted. The case was then assigned to Chief ALJ John M. Vittone. By Order of Continuance issued March 22, 2005, the case was again returned to the docket at the request of the DOL. The case was subsequently assigned to me and by Notice of Hearing issued June 2, 2005, I scheduled a hearing to be held on October 26, 2005 in

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C.F.R. § 718.101(b)(2001); 20 C.F.R. § 725.2(c)(2001). The United States Court of Appeals for the District of Columbia has upheld the validity of the revised regulations. See National Mining Assoc. v. Department of Labor, 292 F.3d 849 (D.C. Cir. 2002).

Birmingham, Alabama. At the hearing, Claimant testified[2] and evidence[3] was admitted to the record. By Order issued March 21, 2006, I closed the record in this matter and scheduled May 4, 2006 as the deadline for submission of closing arguments. Claimant's post-hearing brief[4] was received on May 8, 2006. Employer's post-hearing brief[5] was submitted on May 12, 2006. All relevant evidence of record has been carefully reviewed. The following decision is based upon a review of the evidentiary record, the arguments of the parties and an analysis of the applicable law.

B. Factual Background

1) Stipulation of the Parties

The parties stipulated that Claimant had accrued sixteen years of coal mine employment. Tr. at 9. This stipulation is supported by the evidence, and I therefore credit Claimant with sixteen (16) years of coal mine employment.

2) Claimant's Testimony (Tr. at 16-56)

Claimant estimated that he began working in the coal mines in 1968, and spent the first ten years of his coal mine employment as a driller. He described the conditions he worked in as being very dusty. Claimant denied that his employers offered him any kind of mask or respirator. Claimant also worked as a ground man and a shovel operator for Employer. His last job was as a shovel operator. That job consisted of walking up a 120 foot boom at a steep angle and using heavy tools such as a jackhammer. Claimant testified that he worked mostly 16-hour shifts six to seven days a week. He also worked 24-hour shifts on occasion.

Claimant currently suffers from breathing problems, which prevent him from engaging in any activity, including cutting his own lawn. He cannot walk up and down steps twice without stopping for air. Claimant has never suffered from heart problems. He was uncertain about whether he has been diagnosed with asbestos.

Claimant is currently prescribed Combivent from an inhaler, which he uses three times a day. He also takes Albuterol sulfate. These medications are prescribed by Claimant's "breathing doctor," Dr. Dey.

Claimant began smoking cigarettes when he was approximately fourteen (14) years old. He smoked from [1953] until he quit in 1974. He then resumed smoking in the late 1970's and smoked until he finally quit in 1984. He has not smoked since. When he did smoke, Claimant smoked about a pack per day.

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[2] "Tr. at -" denotes the hearing transcript of October 26, 2005.
[3] "DX-1" through "DX-47" denotes the Director's exhibits received into the record. Tr. at 8.
"CX-1" and "CX-2" denote Claimant's exhibits received into the record. Tr. at 12.
"EX-1" through "EX-5" denote Employer's exhibits received into the record. Tr. at 14-15.
[4] Denoted as "CB at -."
[5] Denoted as "EB at -."

Claimant was laid off by Employer in 1981 when the mine shut down. After the layoff, Claimant worked at two other coal mines. The first was Jerry Calvert, at which he worked from 1981 through October 1982. Claimant also worked for Faulkner Energy Corporation in the years 1985 and 1986 for a total time of two weeks shy of a year. After that, Claimant worked for a number of companies driving trucks. Those jobs, however, had "nothing concerned with dust." He quit those jobs in 1998 when he became injured on the job.

C. Entitlement

Benefits are provided under the Black Lung Act for miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a). "Pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201(a). Because this claim was filed subsequent to January 19, 2001, Claimant's entitlement to benefits will be evaluated under the revised regulations set forth at 20 C.F.R. Part 718. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner has pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner it totally disabled, and (4) the miner's pneumoconiosis contributes to his total disability. 20 C.F.R. § 725.202(d)(2)(i)-(iv); See Director, OWCP v. Greenwich Colliers, 512 U.S. 267 (1994); Perry v. Director, OWCP, 9 B.L.R. 1-1, 1-2 (BRB 1986).

1) Whether Claimant Has Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis set forth at §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).

(2) Biopsy or autopsy evidence: § 718.202(a)(2).

(3) Regulatory presumptions: § 718.202(a)(3):

> (a) § 718.304 - Irrebuttable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.
>
> (b) § 718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.
>
> (c) § 718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971.

and

(4) Physician's opinions based upon objective medical evidence: § 718.202(a)(4).

In addition, the regulations permit an ALJ to give appropriate consideration to "the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis." 20 C.F.R. § 718.107(a).

The following is a discussion of the § 718.202(a) evidence of record:

(a.) Chest X-Ray Evidence - § 718.202(a)(1).

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102.[6] An ALJ may utilize any reasonable method of weighing the X-ray evidence. Sexton v. Director, OWCP, 752 F.2d 213 (6th Cir. 1985). Generally, a physician's qualifications at the time he/she renders an interpretation should be considered. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32 (1985). It is well established that it is proper to credit the interpretation of a dually qualified (B-Reader and BCR) physician over the interpretation of a physician who is solely a B-Reader. Zeigler Coal Co. v. Director, OWCP [Hawker], 326 F.3d 894 (7th Cir. 2003) (complicated pneumoconiosis); Cranor v. Peabody Coal Co., 22 B.L.R. 1-1 (1999) (en banc on recon.); Sheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). The Board has also held that greater weight may be accorded the X-ray interpretation of a dually qualified physician over that of a physician who is only a BCR. Herald v. Director, OWCP, BRB No. 94-2354 BLA (Mar. 23, 1995) (unpublished). In addition, an ALJ is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The current record contains the following chest X-ray evidence:

Date of X-Ray	Date Read	Exhibit No.	Physician	Radiological Credentials	Film Quality	Interpretation
(1)						
10/15/02	10/23/02	DX-18	Ballard	B-Reader BCR[7]	1	1/0
10/15/02	11/25/02	DX-18	Goldstein	B-Reader	1	Quality only

[6] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51 A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

[7] Claimant asserts that Dr. James Ballard is a Board-certified radiologist. However, Dr. Ballard's CV is not included in the record before me.

10/15/02	07/29/03	DX-19	Wiot	B-Reader; BCR	1	Completely negative
10/15/02	10/07/03	DX-20	Ahmed	B-Reader; BCR	1	1/1
(2)						
10/14/04	10/14/04	CX-1	Bailey	None	Not reported	negative
(3)						
02/24/05	02/24/05	EX-4	Goldstein	B-Reader	1	negative
02/24/05	10/07/05	CX-1	Miller	B-Reader; BCR	1	1/0

The preceding table demonstrates that three X-rays of Claimant's chest are relevant to this matter.

The first X-ray was performed on October 15, 2002, and was read by four physicians. Dr. Ballard and Dr. Ahmed, both dually-qualified physicians (i.e. B-Readers and Board-certified radiologists), interpreted the X-ray as Categories 1/0 and 1/1 positive, respectfully. Dr. Wiot, also dually-qualified, read the X-ray as completely negative. Dr. Goldstein only read the X-ray for quality purposes. A review of the readings by Drs. Ballard and Ahmed disclose that they are fairly consistent. Dr. Ahmed found parenchymal opacities scattered throughout both lungs of size t/p. Dr. Ballard found parenchymal opacities in the mid and lower zones of the lungs of size and shape s/t. Although Drs. Ahmed and Ballard made slightly differing Category classifications, 1/0 as opposed to 1/1, that difference is not materially significant. The difference between Category 1/1 and 1/0 is that Dr. Ahmed only considered Category 1 while Dr. Ballard also considered a classification of Category 0. Nevertheless, each of those classifications equals a Category 1 finding, which means that there is a definite presence of opacities in the lung and the X-ray report may be used as evidence of the existence of pneumoconiosis. Dr. Wiot's interpretation, on the other hand, materially differs from the other two physicians. Dr. Wiot interpreted the X-ray film as "completely negative." This is completely contrary to the findings of Drs. Ballard and Ahmed. It is within the discretion of an ALJ to rely on the numerical superiority of X-ray readings. Edmiston v. F & R Coal Co., 14 B.L.R. 1-65 at 1-68. Because all three physicians are dually-qualified, I find that the positive X-ray readings by Drs. Ballard and Ahmed outweigh the negative reading by Dr. Wiot. Accordingly, I find that the October 15, 2002 X-ray supports a finding of pneumoconiosis.

The second X-ray of record was performed on October 14, 2004. Dr. Bailey, who is neither a B-Reader nor a Board-certified radiologist, EX-2 at 22, interpreted it as negative. He found that it did not reveal any abnormalities consistent with coal workers' pneumoconiosis. Since there is no reading to rebut that, I find that the X-ray does not support a finding of pneumoconiosis. However, based upon Dr. Bailey's credentials, I accord that X-ray reading diminished probative weight.

The third X-ray of record was performed on February 24, 2005. It was read as Category 1/0 positive by Dr. Miller and negative by Dr. Goldstein. Dr. Miller is dually-qualified while Dr. Goldstein is only a B-Reader. As such, Dr. Miller's positive reading outweighs that of Dr.

Goldstein. Accordingly, I find that the February 24, 2005 X-ray supports a finding of pneumoconiosis.

Employer mentions in its brief that the record includes an X-ray interpretation by Dr. Hawkins. EB at 11. Dr. Hawkins makes a note of the October 15, 2002 X-ray in his report found at DX-18. He notes that there are "parenchymal changes consistent with pneumoconiosis." I find that this note provides insufficient information to make a factual finding on the presence or absence of pneumoconiosis. The note is unclear as to whether Dr. Hawkins read the film himself or whether he is relying on Dr. Ballard's reading which is found in the same exhibit. Accordingly, Dr. Hawkin's notation has little probative value.

Weighing all of the X-ray evidence together, I find that it demonstrates the presence of pneumoconiosis. There are three X-rays on record. I have found that two of the X-rays are positive for pneumoconiosis while the other, read by a physician with no credentials in radiology, is negative. Accordingly, I find that the preponderance of the X-ray evidence supports a finding of the presence of pneumoconiosis pursuant to § 718.202(a)(1).

(b) Biopsy or autopsy evidence - § 718.202(a)(2).

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

(c) Regulatory presumptions - § 718.202(a)(3).

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. § 718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

(d) Physicians' opinions - § 718.202(a)(4).

The fourth way to establish the existence of pneumoconiosis under § 718.202(a) is set forth as follows in subparagraph (4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine

employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis."

The record contains the following physicians' opinion evidence:

Report of Dr. Jeffrey W. Hawkins, M.D.

Dr. Hawkins conducted a pulmonary evaluation of the Claimant, and prepared a report of his findings. DX-18. In his report, Dr. Hawkins notes that he reviewed Claimant's employment history and medical history, performed a physical examination and either administered or reviewed the results of a chest X-ray, pulmonary function study, and arterial blood gas study. Dr. Hawkins diagnosed Claimant with (1) chronic bronchitis and (2) pneumoconiosis. Dr. Hawkins listed the following as the etiology of his diagnoses: (1) cigarette smoke/prior dusts/Atopic-Reactive Airway Disease and (2) dusts.

Report of Dr. Gerald C. Dey, M.D.

Dr. Dey is a board certified pulmonologist[8] who treated Claimant. Dr. Dey prepared numerous reports found at CX-2. The reports disclose that Dr. Dey reviewed health histories, performed physical examinations, and administered pulmonary function studies. A report dated November 7, 2003 diagnoses (1) chronic bronchitis and (2) probable sleep apnea. A report dated October 10, 2003 diagnoses (1) obstructive sleep apnea with hypersomnia ("sleep apnea"), (2) chronic bronchitis, (3) possible coronary artery disease, and (4) angina. A report dated November 25, 2003 diagnoses (1) sleep apnea and (2) chronic obstructive pulmonary disease ("COPD"). Reports dated January 8, 2004 and April 8, 2004 diagnose (1) chronic bronchitis and (2) sleep apnea. A report dated July 8, 2004 diagnoses (1) chronic bronchitis, (2) coal dust exposure, and (3) sleep apnea. In that report, Dr. Dey documented that Claimant "stresses the fact that he has black lung syndrome and that this is the predominant cause of his respiratory status. I have attempted to explain to him that he has chronic bronchitis, which is a significant cause of his cough and shortness of breath." A report dated November 9, 2004 diagnoses (1) chronic bronchitis and (2) coal workers' pneumoconiosis. In his report of February 8, 2005, Dr. Dey diagnosed (1) chronic bronchitis and (2) coal workers' pneumoconiosis.

Report and Deposition of Dr. William C. Bailey, M.D.

Dr. Bailey prepared reports found at EX-1 and EX-3 and a transcript of his deposition testimony is found at EX-2. Dr. Bailey reviewed Claimant's medical records as well as a chest X-ray, pulmonary function study, and an arterial blood gas study, which were all administered on October 14, 2004. Dr. Bailey diagnosed Claimant with (1) obesity, (2) hypertension, and (3) COPD. He also found that pulmonary function testing disclosed an impairment related to the combined effects of obesity and COPD.

At his deposition, Dr. Bailey testified that Claimant's coal mine employment history was of sufficient duration for a susceptible individual to contract coal workers' pneumoconiosis.

[8] I take official notice that Dr. Dey is a physician who is Board certified in internal medicine and pulmonary medicine, and is listed as such by the American Board of Medical Specialties at their website, http://www.abms.org.

EX-2 at 11. However, Dr. Bailey related Claimant's diagnosed COPD to cigarette smoking. EX-2 at 21. Dr. Bailey testified that most patients with coal workers' pneumoconiosis have nodular densities spread throughout their lungs, and he found no evidence of such densities on an X-ray of Claimant's lungs that the doctor concluded was normal. EX-2 at 21. Based on that, the doctor declined to diagnose pneumoconiosis. Dr. Bailey also disclosed that he is not a B-Reader. EX-2 at 22.

Report and Deposition of Dr. Allan R. Goldstein, M.D.

Dr. Goldstein is Board-certified in Internal Medicine and the subspecialty of Pulmonary Medicine. EX-5 at 7. He is also a B-Reader. Dr. Goldstein prepared a report found at EX-4 and his deposition testimony is found at EX-5. Dr. Goldstein reviewed Claimant's employment history and past medical history. The doctor also conducted a physical examination, and administered a chest X-ray, a pulmonary function study, and an arterial blood gas study. In his report, Dr. Goldstein concluded that Claimant's history would "suggest" chronic bronchitis.

At his deposition, Dr. Goldstein testified that based on Claimant's 13-years of coal dust exposure, "it would be reasonable for him to be considered as possibly having coal workers' pneumoconiosis." EX-5 at 10. However, Dr. Goldstein also opined that Claimant's smoking history was sufficient to result in the development of lung disease. EX-5 at 11. The doctor further testified that his review of the chest X-ray he administered showed no evidence of either nodular or linear infiltrates. EX-5 at 14. Dr. Goldstein testified that in his opinion, Claimant does not have clinical or legal coal workers' pneumoconiosis. EX-5 at 18. He also testified that he does not believe chronic bronchitis is a diagnosis Claimant carries today. EX-5 at 19-20.

(e) Discussion

Drs. Hawkins and Dey opine that Claimant suffers from coal workers' pneumoconiosis while Drs. Bailey and Goldstein do not. Dr. Dey is a pulmonary physician who treated Claimant and conducted several physical examinations. Pursuant to 20 C.F.R. § 718.104(d), I have considered the nature and duration of the patient-physician relationship, and the frequency and extent of the treatment. I find it appropriate to accord Dr. Dey's opinion additional weight on the basis of his status as treating physician, in addition to his credentials as a Board certified pulmonologist. Although the records reveal that Dr. Dey attributed Claimant's reported symptoms to conditions other than pneumoconiosis, the doctor specifically diagnosed Claimant with the disease. In addition, Dr. Dey's primary diagnosis was that Claimant has chronic bronchitis. The Board has held that chronic bronchitis can fall within the legal definition of pneumoconiosis. Hughes v. Clinchfield Coal Co., 21 B.L.R. 1-134, 1-139 (1999). I note that the doctor's diagnosis of pneumoconiosis is based in part upon a positive X-ray reading, for which the doctor has no special credentials to read, but I decline to discredit his opinion on that ground alone, in consideration of his credentials and status. I find that the doctor's opinion is well-documented and well-reasoned, and I accord it substantial weight.

Although Dr. Goldstein acknowledged that Claimant's coal mine employment history was of sufficient duration[9] to give rise to pneumoconiosis, he rejected this diagnosis in favor of crediting Claimant's past smoking history as the cause of Claimant's respiratory impairment. Because Dr. Goldstein rejected pneumoconiosis as a diagnosis primarily on the basis of a negative X-ray, I find that his opinion is somewhat compromised. The doctor's reading of a single X-ray is not reconciled with other X-ray evidence that doctors have found establishes the existence of pneumoconiosis. I note that earlier X-rays had been read as positive for the disease. Dr. Goldstein specifically stated that Claimant did not have legal or clinical pneumoconiosis, and he acknowledged that Claimant has bronchitis. The doctor attributed smoking as the cause of bronchitis, based upon the restrictive nature of PFS results. However, I accord more weight to Claimant's treating pulmonologist on this issue. Dr. Dey diagnosed Claimant with both pneumoconiosis and bronchitis, and did not exclude his coal dust exposure as a reason for bronchitis. (I note that Dr. Dey's reports reflect that in treating the Claimant he focused more on the manifestation of bronchitis than its causes). I find that Dr. Goldstein's opinion is entitled to less weight overall.

Dr. Bailey's testimony does not persuade me on this issue. His opinion is based in part upon the reading of an X-ray that he administered. However, Dr. Bailey is not certified as a B-Reader. I therefore decline to give his opinion as to the existence of pneumoconiosis much weight. In addition, Dr. Bailey made a conclusory diagnosis about the etiology of Claimant's pulmonary impairment. As did Dr. Goldstein, Dr. Bailey acknowledged that Claimant's coal mine employment was of sufficient duration to allow an individual to develop pneumoconiosis. However, Dr. Bailey summarily attributed Claimant's pulmonary condition to his past smoking history. I find that the doctor's rationale is not fully explained, and accordingly, I find his opinion is entitled to reduced weight.

Dr. Hawkins similarly did not review X-ray evidence other than the film taken in conjunction with his test. However, the X-ray reading that the doctor relied upon was rendered by a dually qualified physician, and therefore, Dr. Hawkins' conclusions are entitled to enhanced weight. Moreover, Dr. Hawkins attributed Claimant's pulmonary condition to both pneumoconiosis and his smoking history. I find that Dr. Hawkins' opinion is well-documented and well-reasoned and entitled to substantial weight.

Considering all of the physician opinion evidence of record, I find that it establishes the presence of pneumoconiosis.

(f) "Other Medical Evidence"

There was no evidence submitted in this case to be considered under 20 C.F.R. § 718.107(a).

I find that both the X-ray evidence, and the physician opinion evidence establishes that Claimant has pneumoconiosis. Therefore, Claimant has satisfied this element of entitlement.

[9] Although Dr. Goldstein relied upon a coal mine employment history of thirteen years as opposed to the sixteen years established herein, I find that this disparity is not so significant as to compromise his opinion.

2) Whether the Pneumoconiosis "Arose Out of" Coal Mine Employment

The Regulations mandate that in order for a claimant to succeed on a claim for benefits under the Act, "it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment." 20 C.F.R. § 718.203(a). There is a rebuttable presumption that the pneumoconiosis arose out of coal mine employment if a miner who is or was suffering from pneumoconiosis was employed for ten years or more in one or more coal mines. 20 C.F.R. § 718.203(b); § 718.302.

Claimant worked for (16) years in coal mine employment, and therefore, the rebuttable presumption is triggered. No evidence of record rebuts that presumption. Accordingly, I find that Claimant has established that his pneumoconiosis arose out of coal mine employment.

3) Whether Claimant is Totally Disabled

In addition to establishing the presence of coal workers' pneumoconiosis, in order for Claimant to prevail under the Act, he must establish that he is totally disabled due to a respiratory or pulmonary condition. 20 C.F.R. § 718.204(a). A miner is considered totally disabled within the Act if "the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time."

20 C.F.R. § 718.204(b)(1). The regulations at § 718.204(b) provide the following five methods to establish total disability: (a) pulmonary function studies; (b) arterial blood gas studies; (c) evidence of cor pulmonale with right-sided congestive heart failure; (d) reasoned medical opinions; and (e) lay testimony. 20 C.F.R. §§ 718.204(b)(2) and (d). However, in a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony. 20 C.F.R. § 718.204(d)(5); Tedesco v. Director, OWCP, 18 B.L.R. 1-103 (1994). Further, a presumption of total disability is not established by a showing of evidence qualifying under a subsection of § 718.204(b)(2), but rather such evidence shall establish total disability in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

(a) Pulmonary Function Studies

In order to demonstrate total respiratory disability on the basis of pulmonary function study evidence, a claimant may provide studies, which, after accounting for sex, age, and height, produce a qualifying value for the FEV1 test, and produce either a qualifying value for the FVC

test or the MVV test, or produce a value of FEV1 divided by the FVC less than or equal to 55 percent. "Qualifying values" for the FEV1, FVC and the MVV tests are measured results less than or equal to values listed in the appropriate tables of Appendix B to 20 C.F.R. Part 718, 20 C.F.R. § 718.204(b)(2)(i).

The parties submitted the following pulmonary function studies ("PFSs") summarized below:

Date	EX. No.	Physician	Age/ Ht.	FEV_1	FVC	MVV	FEV_1/FVC	Effort	Qualifies
10/15/02	DX-18	Hawkins	63 69"	1.71	2.47	62	69%	Good	YES FEV_1: 1.92 MVV: 77
10/14/04	EX-1	Bailey	65 71"	1.79	2.32	47	77%	Not reported	YES FEV_1: 2.04 FVC: 2.61
2/08/05	CX-2	Dey	65 70"	1.80	2.49	44	73%	Not reported	YES FEV_1: 1.98 FVC: 2.54
2/24/05	EX-4	Goldstein	65 71"	2.11 1.94*	2.53 2.46*	62 67*	83% 79%*	Good (EX-5 at 15)	NO YES* FEV_1: 2.04 FVC: 2.61

*Post-bronchodilator

As the preceding table demonstrates, there are four PFSs of record. Employer argues that the PFS administered by Dr. Dey ought to be discredited because it is not accompanied by three tracings. EB at 16 (citing Estes v. Director, OWCP, 7 B.L.R. 1-414 (1984). I agree with Employer and find that the February 8, 2005 PFS is not valid. However, two of the three valid PFSs produced qualifying values under the regulations. In addition, the values obtained after administration of bronchodilator in the PFS performed by Dr. Goldstein also produced qualifying values. Therefore, I find that the preponderance of the PFS evidence supports a finding of total disability.

(b) Arterial Blood Gas Studies

To establish total disability based on Arterial Blood Gas Studies, the test must produce the totals presented in the Appendix C to 20 C.F.R. Part 718, 20 C.F.R. § 718.204(b)(2)(ii).

The record contains the following arterial blood gas studies ("ABGs") summarized below:

Date	EX. No.	Physician	Altitude	pCO_2	pO_2	Qualifies[10]
10/15/02	DX-18	Hawkins	0-2999 ft	40 41*	121 97*	**NO** (69) (69)*

[10] In order to qualify for total disability under arterial blood gas studies, Claimant's pCO_2 value would have to be equal to or lower than the given pO_2 levels found in the "Qualifies" column of this chart.

10/14/04	EX-1	Bailey	Not reported	40	92	**NO** (69)
2/24/05	EX-4	Goldstein	Not reported	42	84	**NO** (69)

*Measured at the end of or during exercise

As the preceding table demonstrates, none of the ABGs of record reflect qualifying values under the regulations. Claimant cannot demonstrate total disability with arterial blood gas study evidence.

(c) Cor Pulmonale Diagnosis

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided heart failure. 20 C.F.R. § 718.204(b)(2)(iii).

There is no evidence of cor pulmonale with right-sided congestive heart failure in the record. Accordingly, I find that Claimant has not demonstrated total disability pursuant to § 718.204(b)(2)(iii).

(d) Reasoned Medical Opinion

The fourth method for determining total disability is through the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful employment. Such an opinion must be based on acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (BRB 1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (BRB 1989).

Dr. Hawkins

In his report at DX-18, Dr. Hawkins found that Claimant had a mild pulmonary or respiratory impairment. He opined that Claimant cannot perform manual labor and that he should avoid further exposure to dusts.

Dr. Dey

In his report at CX-2, Dr. Dey found that Claimant had a "mild diffusion impairment." However, Dr. Dey failed to opine as to whether Claimant was capable of returning to coal mine employment.

Dr. Bailey

In his report at EX-1, Dr. Bailey found that Claimant "has moderate mixed obstructive and restrictive ventilatory impairment." Dr. Bailey testified that the impairment "prevents [Claimant] from doing some heavy work that he probably could do better before." EX-2 at 25.

Dr. Goldstein

Dr. Goldstein testified that he found that Claimant has a mild restrictive defect. EX-5 at 15-16. However, Dr. Goldstein testified that despite that impairment, Claimant would still be able to "operate a dozer, operate a drill or even operate a truck." EX-5 at 19.

(e) Lay Testimony

At the formal hearing, Claimant testified that his last coal mine job was a "shovel operator." That work required him to walk long distances at steep angles and lift heavy tools such as a jackhammer.

(f) Discussion

After considering the relevant evidence of record, I find that Claimant has established that he is totally disabled within the meaning of the Act. As I have stated, the pulmonary function study evidence weighs heavily in Claimant's favor. In addition, all four physicians found that Claimant suffered from some type of pulmonary or respiratory impairment. Only Dr. Goldstein opined that Claimant could return to coal mine employment without restrictions. Dr. Goldstein's testimony was not overly convincing, considering that the pulmonary function test that the doctor administered produced qualifying values after bronchodilator. Claimant's testimony, the credibility of which has not been questioned, establishes that his last coal mine employment consisted of duties more demanding than those Dr. Goldstein was questioned about. Therefore, I find that Dr. Goldstein's opinion is entitled to diminished weight.

Dr. Bailey opined that Claimant is restricted from performing certain work that he had been previously capable of performing. Dr. Hawkins concluded that Claimant could not engage in manual labor due to his impairment. Dr. Dey rendered no opinion on this issue. The evidence substantially establishes that that Claimant is totally disabled within the meaning of the Act.

4) Whether Claimant's Pneumoconiosis Contributes to His Total Disability

The amended regulations at Part 725 mandate that a miner is eligible for benefits if his "pneumoconiosis contributes to [his] total disability." 20 C.F.R. § 725.202(d)(2)(iv). "Total disability due to pneumoconiosis"[11] is defined at 20 C.F.R. § 718.204(c) as follows:

> (1) A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis…is a substantially contributing cause of the miner's totally

[11] I note that although there exists an ambiguity in the language of the analysis, 20 C.F.R. § 725.202(d)(2)(iv) cross-references 20 C.F.R. § 718.204(c).

disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1)(i) and (ii); See also Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990) (the "due to pneumoconiosis" requirement demands evidence that "pneumoconiosis was a substantial contributing factor in the causation of the [miner's] total pulmonary disability").

The cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. 20 C.F.R. § 718.204(c)(2). A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). A "reasoned" opinion is one in which the ALJ finds the underlying documentation and data adequate to support the physician's conclusions. Fields, *supra*.

(a) Medical Opinion Evidence

Dr. Hawkins

In his report, Dr. Hawkins opined that (1) cigarette smoke/prior dusts/ATOPIC-Reactive Airways disease and (2) dusts were the primary and secondary causes of Claimant's cardiopulmonary diagnoses (which consisted of both chronic bronchitis and pneumoconiosis). DX-18. He attributed 70% of Claimant's impairment to cigarette smoking and 30% to dust exposure.

Dr. Dey

Dr. Dey's report establishes neither total disability nor total disability due to pneumoconiosis. Dr. Dey makes no definitive statement on these issues. Therefore, Dr. Dey's report lacks probative value on the issue of whether Claimant is totally disabled due to pneumoconiosis.

Dr. Bailey

Dr. Bailey opined that Claimant's obstructive ventilatory impairment is related to the joint effect of his obesity and COPD. EX-1. He relates the COPD to cigarette smoking. EX-2 at 21. When asked whether he felt Claimant's respiratory or pulmonary impairment was in any way related to, caused by or hastened by coal dust exposure, Dr. Bailey answered, "Well, I can't say there is absolutely no component, but I don't think its measurable or a significant amount. I think it's most clearly explained by his obesity and his cigarette smoking producing COPD."

EX-2 at 25-26. He later testified that he did not believe that Claimant was totally disabled as a result of his coal dust exposure "at all." EX-2 at 29. Dr. Bailey also testified that his opinion was based upon Claimant's smoking history and the fact that he found no evidence of pneumoconiosis on the X-ray he read. EX-2 at 30.

Dr. Goldstein

Dr. Goldstein opined that Claimant has no evidence of any impairment related to coal dust, rock dust, or diesel fumes. He reported that Claimant has a history that suggests chronic bronchitis but has pulmonary functions that are restrictive and would be consistent with his obesity. EX-4. He further opined that Claimant's chronic bronchitis is related to smoking. Id. At his deposition, Dr. Goldstein testified that Claimant's restrictive defect is consistent with Claimant's weight. EX-5 at 16. He further testified:

> The concern that I would have is whether or not a restrictive defect could be related to interstitial disease that would be consistent with coal workers' pneumoconiosis. In that case, you wouldn't have a diffusing capacity at normalized [sic] when it was corrected for the alveolar volume. It would be unlikely that you would have normal blood gasses. And when you have a restrictive defect where the total lung capacity is 74 percent and the forced vital capacity is only in the range of 55 percent, you would expect a chest X-ray that would be abnormal. His was not abnormal.

EX-5 at 16.

(b) Discussion

It is Claimant's burden to establish that his total disability is due to pneumoconiosis by the preponderance of the evidence. Baumgartner v. Director, OWCP, 9 B.L.R. 1-65, 1-66 (1986); Gee v. Moore & Sons, 9 B.L.R. 1-4, 1-6 (1986)(en banc). The only evidence submitted that purports to establish this element of entitlement is the medical opinion of Dr. Jeffrey Hawkins.[12] Dr. Hawkins is Board-certified in Internal Medicine, Subspecialty in Pulmonary Disease. DX-42.

Employer argues that there is a significant flaw in Dr. Hawkins' report. Dr. Hawkins' listed Claimant's smoking history as starting at age seven (7) and stopping in 1980. The doctor reported that Claimant smoked 1-2 cigarette packs per day. Employer asserts, and Claimant did testify, that he resumed smoking in the late 1970s and then finally quit in 1984. Therefore, Employer argued, Dr. Hawkins' reliance on a faulty smoking history hinders the reliability of his opinion. Dr. Bailey noted a smoking history in his report beginning at about 12-14 years of age and smoking until 1984, with a six year break in the mid-1970's. He noted that Claimant smoked, on average, a pack per day. Dr. Goldstein reported that Claimant began smoking at about age 16 and smoked up to a pack per day until 1974. Claimant then resumed smoking in

[12] Claimant's coal mine employment did not consist of fifteen (15) years or more in an *underground* coal mine. He is therefore not afforded the rebuttable presumption of total disability due to pneumoconiosis found at 20 C.F.R. § 718.305.

1979 and finally quit in 1984, having smoked a pack to a pack and a half daily during that period.

After considering the reports of those three physicians, I find that Dr. Hawkins' assessment of Claimant's smoking history is not significantly tainted. Dr. Hawkins reported that Claimant began smoking at age seven (7) while the other physicians noted that Claimant began smoking between ages fourteen (14) to sixteen (16). Thus, although Dr. Hawkins did not rely on a smoking history that included the years 1980 to 1984, he relied on a history that did include seven to nine years of smoking prior to the histories relied upon by Drs. Goldstein and Bailey. I therefore find that Dr. Hawkins' opinion is based upon a smoking history in pack years that is as much as, if not more than, the estimates used by Drs. Goldstein and Bailey.

Unlike Drs. Goldstein and Bailey, Dr. Hawkins' opinion is based upon a diagnosis of coal workers' pneumoconiosis. That diagnosis is consistent with my findings. Dr. Hawkins' opinion is therefore better-supported by the medical evidence and it is proper to accord his opinion more probative weight. See Toler v. Eastern Assoc. Coal Co., 42 F.3d 109 (4th Cir. 1995). He found that 30% of Claimant's impairment is due to "dusts." I find that this diagnosis establishes that Claimant's pneumoconiosis significantly contributes to his total disability. Accordingly, Claimant has established that his total disability is due to pneumoconiosis.

I find that Dr. Goldstein's explanation for his dismissal of pneumoconiosis as a causative agent in Claimant's disability is not entirely well-reasoned or well-documented. The doctor relied upon his negative X-ray reading, and his conclusion that Claimant was not disabled, despite qualifying values on one part of a PFS that the doctor conducted, is not inherently consistent.

I find that Dr. Bailey's opinion is not entirely consistent, given his acknowledgement of Claimant's impairment and the fact that his coal mine employment could be of sufficient duration to cause pneumoconiosis. In addition, Dr. Bailey testified that he could not say that coal dust exposure was "absolutely no component" in Claimant's pulmonary impairment, but the doctor also testified that Claimant's disability was not at all a result of his coal dust exposure. EX-2 at 29. Dr. Bailey's opinion is compromised by inconsistency.

I conclude that the best documented and reasoned medical opinion evidence establishes that Claimant's disability is due to pneumoconiosis, within the meaning of the Act.

D. Responsible Operator

Employer acknowledges that Claimant worked for Calvert & Youngblood Coal Co. in 1958 and again in 1968 until 1981. EB at 9. The evidence also reflects that Claimant worked for other coal mine employers after 1981. The first was Jerry Calvert, at which he worked from 1981 through October 1982. Claimant worked for Faulkner Energy Corporation ("Faulkner") from 1985 to 1986 on a strip mine. Employer asserts that Claimant worked for Faulkner for the requisite period to make that entity the responsible operator in this case. EB at 10.

Once the prerequisites of 20 C.F.R. § 725.494 are met and a company is designated as the responsible operator, the regulations provide that the operator or other employer, with which the miner had the most recent cumulative employment of not less than one year, shall be considered the responsible operator. 20 C.F.R. § 725.495. As a result, where there is more than one operator for whom the claimant worked a cumulative total of at least one year, this section imposes liability on the most recent employer. Snedecker v. Island Creek Coal Co., 5 B.L.R. 1-91 (1982).

The issue in this case is whether another employer is a potentially liable operator under the criteria of 20 C.F.R. § 725.494. The critical criterion to make this determination is whether:

> The miner was employed by the operator, or any other person with respect to which the operator may be considered a successor operator, for a cumulative period of not less than one year.

20 C.F.R. § 725.494(c). That section then cross-references § 725.101(a)(32) which defines the term "year." That section reads:

> *Year* means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner…

20 C.F.R. § 725.101(a)(32).

Claimant's Social Security account records reflect that he worked for Jerry Calvert Inc., earning $4,064.00 in 1981, and $8,763.00 in 1982. Claimant testified that he worked for that concern stripping coal, for "pretty close to a year". DX-7 at 17. Claimant testified that he worked for Johnny Calvert "a little bit in '81, a little bit in '82". Tr. at 43. Claimant had also worked for Johnny Calvert earlier in his mining career for several years in the late 1950's. Tr. at 40-42. There is no evidence of record to contradict Claimant's testimony, and I find that it has not been established that Johnny Calvert is the responsible operator.

Employer asserts that the Itemized Statement of Earnings from the Social Security Administration ("SSA") demonstrates that Faulkner is the responsible operator. Employer argues, "In fact, Faulkner Energy Corporation reported the Miner earned $20,487.00 in 1985 and $10,704.00 in 1986. The named employer respectfully contends that these earnings satisfy the requirements of a cumulative year" under the regulations. EB at 10.

The designated responsible operator shall bear the burden of proving that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c)(2). I find that submission of the SAA Statement of earnings does not establish that burden. The term "year" is not defined in terms of dollars earned under the regulations. It is defined as working a total of at least 125 days within a calendar year. The earnings statement does not establish that Claimant worked 125 days within a calendar year. The flaw in the statement is that the

"beginning" and "end" dates of Claimant's employment with Faulkner cannot be accurately ascertained from it. While the statement suggests that Claimant may have worked a significant period of time for Faulkner, the record does not establish that he worked for Faulkner for the period contemplated by the Act. Claimant testified that he worked at Faulkner for less than one year: He recalled working for them for about eight months before they shut down. DX-7 at 15. Employer has not offered evidence to discredit Claimant's testimony. The earnings statement does not contradict his testimony.

I find that Employer has not established that it is not the responsible employer that most recently employed the miner, within the meaning of the Act.

III. CONCLUSION

Based upon my review of the record, I find that Claimant has established that he is totally disabled due to pneumoconiosis. As such, he has established entitlement to benefits under the Act. In addition, Employer has failed to establish that it is not the responsible operator in this claim.

IV. ATTORNEY'S FEES

No award of attorney's fees for services to Claimant is made herein because no fee application has been received. Thirty (30) days is hereby allowed Claimant's counsel for the submission of a fee application which must conform to subsections 725.365 and 725.366 of the regulations. A service sheet showing that service has been made upon all parties including Claimant must accompany the application. Parties have ten (10) days following receipt of any such application within which to file any objection. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim of KENNETH E. MORGAN for benefits under the Act is hereby AWARDED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and

the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen H. Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).